Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 83-147)

Bonds

Approval and discontinuance of Carrier's Bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: July 1, 1983.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Admiral Merchants Motor Freight, Inc., 215 S. 11th St., Minneapolis, MN; motor carrier; Allied Fidelity Ins. Co. (PB 7/27/82) D 6/7/83 [1]	June 6, 1983	June 6, 1983	Minneapolis, MN $50,000
Algocen Transport Inc., 3049 Devon Dr., Windsor, Ontario, Canada; motor carrier; Old Republic Ins. Co.	June 10, 1983	June 12, 1983	Detroit, MI $50,000
Alto's Express, Inc., 2301 Garry Rd., Cinnaminson, NJ; motor carrier; U.S. Fire Ins. Co. D 7/23/83	July 23, 1979	Aug. 24, 1979	Phila., PA $50,000
H.S. Anderson Trucking Co., Port Arthur, TX; motor carrier; The Travelers Indemnity Co. D 6/16/83	Sept. 17, 1971	Oct. 15, 1971	Port Arthur, TX $25,000
Carolina Western Express, Inc., P.O. Box 3995, Gastonia, NC; motor carrier; Dependable Ins. Co., Inc. (PB 10/20/82) D 5/31/83 [2]	May 30, 1983	June 1, 1983	Wilmington, NC $25,000
Jack Cole-Dixie Highway Co., P.O. Drawer 274, 1900 Vanderbilt Rd., Birmingham, AL; motor carrier; Protective Ins. Co. D 6/6/83	Aug. 20, 1979	Oct. 2, 1979	Mobile, AL $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Collins Moving Systems, Inc., 904 West Morgan St., Kokomo, IN; motor carrier; Fidelity & Deposit Co. of MD D 6/17/83	June 29, 1981	July 20, 1981	Cleveland, OH $50,000
Wayne Daniel Truck, Inc., P.O. Box 303, Mt. Vernon, MO; motor carrier; The Travelers Indemnity Co. D 6/10/83	July 30, 1981	July 30, 1981	St. Louis, MO $50,000
J. D. Drayage Co., P.O. Box 77083, 2955 3rd St., San Fran., CA; motor carrier; Fidelity & Deposit Co. of MD	Nov. 30, 1982	June 9, 1983	San Fran., CA $25,000
Green Streak Services, P.O. Box 3405, Mankato, MN; motor carrier; The North River Ins. Co.	Jan. 20, 1983	Apr. 1, 1983	Minneapolis, MN $50,000
H & W Hotshot Delivery Service, Inc., P.O. Box 96503, Houston, TX; motor carrier; Washington International Ins. Co.	June 2, 1983	June 3, 1983	Houston, TX $50,000
Haney Truck Line, Inc., P.O. Box 485, Cornelius, OR; motor carrier; Oregon Automobile Ins., Co. (PB 6/10/81) D 6/9/83	June 10, 1983	June 10, 1983	Portland, OR $25,000
Hawk of Connecticut, Inc., 137 Harvard Ave., Stamford, CT; motor carrier; Federal Ins. Co. D 6/30/83	June 30, 1971	Sept. 10, 1971	Bridgeport, CT $25,000
M. H. Hillery, Inc., 90 Western Ave., Allston, MA; motor carrier; National Surety Corp. (PB 4/14/77) D 6/3/83 [3]	May 19, 1983	June 3, 1983	Boston, MA $50,000
Intermodal Services, Inc., 11650 Courthouse Blvd., Inver Grove Heights, MN; motor carrier; Old Republic Ins. Co. (PB 2/16/81) D 5/19/83 [4]	Mar. 15, 1983	May 19, 1983	Minneapolis, MN $50,000
Miller Trucking, Inc., 3230 N. Main St., Manchester, MD; motor carrier; U.S. Fidelity & Guaranty Co.	May 2, 1983	June 16, 1983	Balt., MD $25,000
Moore-McCormack Lines, Inc., Two Broadway, New York, NY; water carrier; American Motorists Ins. Co. (PB 1/28/72) D 5/16/83 [5]	May 16, 1983	June 8, 1983	New York Seaport $100,000
National Freight Inc., 57 W. Park Ave., Vineland, NJ; motor carrier; The Aetna Casualty & Surety Co. D 8/1/83	July 10, 1977	Sept. 29, 1977	Phila., PA $50,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Overland Express Inc., 8651 Naples St., NE, Blaine, MN; motor carrier; St. Paul Fire & Marine Ins. Co.	Nov. 10, 1982	June 7, 1983	Minneapolis, MN $50,000
Southwest International Freight Services, Inc., 2020 McDaniel St., P.O. Box 788, Carrollton, TX; motor carrier; Royal Indemnity Co.	June 7, 1983	June 10, 1983	Dallas/Fort Worth, TX $25,000
Texas Con-Tran, Inc., 9722 Telephone Rd., Houston, TX; motor carrier; Washington International Ins. Co. D 6/10/83	Dec. 28, 1979	Jan. 10, 1980	Galveston, TX $25,000
Thunderbird Motor Freight Lines, Inc., 210 E. State, Kokomo, IN; motor carrier; The Aetna Casualty & Surety Co. D 6/1/83	Jan. 7, 1982	Feb. 9, 1982	Houston, TX $25,000
Transcaribbean Trucking Corp., P.O. Box 564, San Juan, PR; motor carrier; American Fidelity Fire Ins. Co. D 6/14/83	Apr. 5, 1972	Aug. 14, 1972	San Juan, PR $25,000
Transportation Systems International, Inc., 2500 Kennedy St., NE, Minneapolis, MN; motor carrier; The American Ins. Co. (PB 4/14/81) D 4/15/83 [6]	Apr. 15, 1983	Apr. 15, 1983	Minneapolis, MN $50,000
Truck Air of the Carolinas, Inc., P.O. Box 6427, Greenville, SC; motor carrier; Ins. Co. of North America	June 15, 1983	June 16, 1983	Charleston, SC $25,000
WTS, Inc., P.O. Box 791, Fenton, MO; motor carrier; The Continental Ins. Co.	June 7, 1983	June 13, 1983	St. Louis, MO $50,000
Yelton Trucking Co., Inc., 513 Buckingham Ave., Wilmington, NC; motor carrier; St. Paul Fire & Marine Ins. Co.	June 6, 1983	June 8, 1983	Wilmington, NC $25,000

[1] Surety is Protective Ins. Co.
[2] Surety is Employers Ins. of Wausau
[3] Surety is Nationwide Mutual Ins. Co.
[4] Surety is U.S. Fidelity & Guaranty Co.
[5] Surety is Peerless Ins. Co.
[6] Surety is Great American Ins. Co.

BON-3-03

GEORGE C. STEUART
(For Marilyn G. Morrison, Director,
Carriers, Drawback and Bonds Division).

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

MARILYN G. MORRISON
(For Director, Office of Regulations and Rulings.)

(C.S.D. 83-29)

This decision holds that, pursuant to the same condition drawback law, section 201 of Public Law 96-609, 19 U.S.C. 1313(j), merchandise imported prior to December 28, 1980 but not entered until that date or thereafter is eligible for same condition drawback upon compliance with the law and operating instructions

Date: October 5, 1982
File: DRA-1-09-CO:R CD:D
215089 B

To: Director, Classification and Value Division, Miami, Florida 33131.

From: Director, Carriers, Drawback and Bonds Division, Service Headquarters.

Subject: Your Request for Internal Advice DRA-1-O:C L AJM of May 12, 1982—Same Condition Drawback 19 U.S.C. 1313(j)—Time of Entry.

The same condition drawback law, Section 201 of Public Law 96-609, 19 U.S.C. 1313(j), allows drawback on merchandise which is exported or destroyed under Customs supervision within three years of *importation* in the same condition as imported. However, the law specifically states it shall be applicable to all merchandise *entered* or withdrawn from warehouse for consumption on or after December 28, 1980.

You have a situation where merchandise was imported on December 10, 1980, and the entry is dated January 7, 1981, and you ask what is the "entered" date for purposes of the law. Two entries are submitted for our comment.

In example one (entry number) the merchandise was released prior to the filing of the CF 7501 entry summary. The commercial invoice submitted to Customs has a Customs release stamp reflecting that delivery was authorized for such merchandise on January 7, 1981. The entry summary was filed with Customs on January 20, 1981.

In example two (entry number) the carrier's certificate and release order contained a Customs release stamp showing that delivery of the merchandise was authorized on January 6, 1981. The entry summary was filed on January 14, 1981.

Section 141.68(a), Customs Regulations, provides that as a general rule when merchandise is released under entry documentation, such as Customs Form 3461, 7533, or other appropriate documentation used to secure the release of the merchandise prior to the filing of the entry summary, the date Customs authorizes the release of such merchandise is the date of entry. The importer has the option of requesting on the entry document (Customs Form 3461, etc.) that the date of the presentation of the entry document or, if the entry document is presented prior to the arrival of the merchandise, the date of arrival be considered the date of entry. Under such circumstances, those earlier dates rather than the date the merchandise was authorized for release from Customs would be considered the date of entry.

Since there is no indication from the information submitted that the importer requested the date of presentation or the date of arrival of the merchandise as the date of entry, we must presume that no such request was made and thus the date of release is the date of entry. In the two examples given, January 7, 1981, would be the date of entry for example one, whereas January 6, 1981, would be the date of entry in example two.

Therefore, it appears that the merchandise covered by both entries qualifies for same condition drawback provided there is timely exportation and the required operating instructions are met. We note that the affidavit for the same condition drawback entry covering (number) refers to (number).

(C.S.D 83-30)

This ruling holds that the use of "foreign-first" accounting in a zone is acceptable in principle. However, its acceptability in operation will be determined on a case-by-case basis

Date: October 7, 1982
File: For-1-CO:R:CD:D
215061 RB

Issue: Whether "foreign-first" accounting is an acceptable method in principle for purposes of identifying fungible (commercially identical) merchandise commingled in a foreign-trade zone.

Facts: None presented.

Law and analysis: Customs attempts to accommodate reasonable requests from the importing public which serve to promote American commerce, both import and export, when no potential exists thereby for evasion of Customs laws and regulations.

Neither the Foreign-Trade Zone Act (FTZA), as amended, 19 U.S.C. 81a-u, nor the implementing Customs Regulations, 19 CFR Part, 146, prohibits in principle the use of "foreign-first" accounting in a foreign-trade zone (FTZ). However, in order to be acceptable in any specific case, it must be consistently applied and cannot be employed in such a manner as to evade Customs and any related laws and regulations. Accordingly, its acceptability in operation will be determined on a case-by-case basis pursuant to the foregoing criteria.

An FTZ user may adopt "foreign-first" accounting as its initial method in a zone to identify its merchandise, without first obtaining Customs permission to do so. However, if an FTZ user presently employs "foreign-first" accounting in a zone to identify its merchandise or if it employs another accounting method in a zone for this purpose and it desires to change either from or to "foreign-first" accounting in the zone, permission to do so must first be obtained from Customs.

At times the use of "foreign-first" accounting may facilitate recordkeeping procedures in a zone and accordingly further stimulate American business and labor by permitting the conduct of any lawful activity in a zone, including manufacturing for export, under minimum cost conditions, which is an underlying purpose of the FTZA (note S. Rept. No. 1107 dated September 26, 1949, 1950 U.S. Code Cong. and Admin. News, 2533, at 2534).

To illustrate the use of this method, if 100 domestic units and 100 foreign units are commingled in a zone, the first 100 units which are subsequently withdrawn therefrom would be identified as the foreign units.

Holding: The use of "foreign-first" accounting in a zone is acceptable in principle. However, its acceptability in operation will be determined on a case-by-case basis.

(C.S.D. 83-31)

This ruling holds that a custom integrated circuit (chip) fur-

nished to the foreign assembler free of charge is an assist, since acquired from an unrelated seller, its value is the cost of acquisition, including U.S. development and design costs

Date: November 29, 1982
File: CLA-2 CO:R:CV:V
542948 BS
TAA #55

Re: Dutiable Status of "Chip" Used in Stereo Receiver.

This is in reference to your letter dated October 20, 1982, concerning the dutiable status of a customs integrated circuit ("chip") used in the assembly of an AM/FM stereo receiver.

Pursuant to the described facts (and to your conversations with Mr. Schlissel of my staff), the chip will be designed in New York, fabricated in initial condition in either Arizona or Scotland, and thereafter completed in Taiwan, for delivery to the Taiwan assembler for assembly in the finished product. The designer-fabricator of the chip will be "G", a U.S. company unrelated to the importer. Separate payments will be made to "G" for the engineering development work, and for the material and fabrication of the chip.

In your opinion, the engineering development cost for the chip is not part of the dutiable value of the imported stereo receiver. You believe that this development cost does not fall within the statutory definition of an assist and therefore is not dutiable.

Section 402(h)(1)(A) of the Trade Agreements Act of 1979 provides in general that the term "assist" means certain enumerated items, if supplied free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for exportation to the United States of the merchandise. Included among the enumerated categories are—

> "(i) Materials, components, parts, and similar items included in the imported merchandise.
>
> "(iv) Engineering, development, artwork, design work and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise."

Thus, under subparagraph (iv), only foreign engineering, development, artwork, etc., if supplied free of charge or at reduced cost by the buyer, will be considered an assist. Conversely, that same work undertaken within the United States is not an assist.

However, in the subject transactions, the U.S. engineering and development will not be provided in that form to the foreign seller. Rather, what is being provided to the seller/assembler is the chip embodying the engineering development. Whether fabricated in the United States or elsewhere, that chip clearly falls within subparagraph (A)(i), *i.e.*, "Materials, components, parts * * * included in the imported merchandise." Therefore, it is an assist.

It seems, however, that you may not be contesting the determination that the chip is an assist; rather, it appears you believe that the value of the assist should not include the engineering and development costs.

Section 152.103(b)(1), Customs Regulations, provides in part that if the assist consists of materials, components, parts, or similar items incorporated in the imported merchandise, acquired by the buyer from an unrelated seller, the value of the assist is its cost of acquisition. This provision makes no exclusion for U.S. based engineering, development, etc., that may have been incurred by the unrelated seller.

In the instant case, the importer will pay "G" a total sum for the chip, consisting of the engineering development charges for the software and an additional sum for the materials and fabrication. The total cost of acquisition to the importer is the sum of these two parts. This sum is the value of the assist.

Under the circumstances, we hold that the "chip" is an assist within the meaning of section 402(h)(1)(A)(i). The value of the assist is its full cost of acquisition from "G," which includes research and development costs incurred in producing the chip.

(C.S.D. 83-32)

This ruling establishes guidelines for acceptable certification of actual use for articles entered under item 870.40 or 870.45, Tariff Schedules of the United States

Date: November 29, 1982
File: CLA-2 CO:R:CV:G
069623 JLV

Re: Guidelines for Determining the Acceptability of Certificates of Actual Use Submitted for Entries Made Under Items 870.40 and 870.45

In order to provide uniformity in the requirements for acceptance of actual use certification for entries under item 870.40 and 870.45, Tariff Schedules of the United States (TSUS), specific guidelines have been established. These guidelines are issued in response to a request for advice from the District Director, Pembina, dated November 4, 1981.

The scope of item 870.40, is limited by Headnote 2 (Schedule 8, Part 7) and by the intent of Congress to those articles which are described in 666.00, but are not classifiable thereunder because they are not chiefly used in agricultural and horticultural pursuits or are provided for under a more specific tariff provision. Therefore, the scope of item 870.40 is controlled by the headnote exceptions and the various judicial, administrative, and legislative deci-

sions affecting item 666.00. Actual use, in this case, requires use by an individual for agricultural or horticultural purposes.

The scope of 870.45 is somewhat different. It provides for parts of articles *provided for* in item 666.00. The term "provided for" is more narrowly construed than the term "described" and refers to articles classifiable in item 666.00. Furthermore, parts imported under 870.45 need only be certified as to actual use in 666.00 articles. Actual use in agricultural or horticultural pursuits is not the controlling issue in 870.45 certification. Actual use, in this case, requires only that the imported parts be used in articles classifiable in item 666.00, whether or not the articles are used in agricultural or horticultural pursuits.

The certification requirements for items 870.40 and 870.45 are to be reasonably tied to the circumstances of each case. Factors to be considered include the nature of an imported article, level of distribution, value and size of an importation. All of these elements and other relevant factors must be considered. In many cases the nature of an article as a replacement part for agricultural equipment will be apparent. For example, articles that are specially designed or have a designated part number can be reasonably identified to be destined for use on a specific article which is provided for in item 666.00. Furthermore, importation and distribution to factory-authorized parts dealers is reasonable evidence that the components will be used in the equipment for which they are designated. If the imported parts have more than a fugitive application to equipment other than agricultural equipment, then the level of distribution could narrow the extent of the claim for 870.45 treatment. Other factors considered relevant by the Customs officer at the port of entry may be used to consider whether an importer would have sufficient knowledge of actual-use without obtaining separate statements from the individual users. This illustration is but one example of how factors are to be considered as relevant for an entry under item 870.45, in which an importer certifies as to actual use.

The burden of satisfying the actual-use certification requirement is on the importer. The importer is, for Customs audit purposes, the only one who can be directly audited on an entry. Therefore, the certifications submitted for each entry must be substantiated by evidence of use acceptable to Customs and verifiable from the importer's records or the records of a certifying person which are available to Customs through the importer. However, in some cases, such as those involving certain types of replacement parts, there will be sufficient evidence of "knowledge" on the part of the importer or certifier that will be acceptable even though the parts have not been actually traced to each end user. Furthermore, Customs will only accept an entry for the percentage of articles which can be reasonably shown by the importer to be destined for use within the meaning of 870.40 and 870.45.

Because the importer remains liable at all times, it is important that the importer be aware of the claims being made on the certificate of actual-use. If an importer is in doubt, he should request a ruling from Headquarters. For example, a replacement part may be imported for a piece of farm equipment which is not provided for in item 666.00. In such case item 870.45 would not apply.

With these considerations in mind, the following guidelines should be used as the basis for acceptance of certification of actual-use:

Item 870.40

1. Certification of actual-use may be accepted at the time of importation for an entry of articles imported under item 870.40 if the articles are the subject of an existing contract of sale to an appropriate end-user. The importer-seller may certify actual-use to Customs on this basis.

2. Some articles described in item 666.00 are not so classifiable because there is a more specific provision. These articles may be shown to be of a kind solely used for agricultural or horticultural purposes because of size, construction, capacity, type of distribution (if any), and type of market in the area of distribution. Any other use would be fugitive. Upon submission of evidence as to the use of these articles (*i.e.,* silos, grain bins, heaters), an importer may submit certification of actual-use after all such imported articles are sold, whether to end-users or to others who distribute to appropriate end-users.

3. Multi-purpose articles entered under item 870.40 require that an importer certify or obtain a certificate which will indicate knowledge of the actual-use or of the individual end-user for each item. Such articles, for example, would include land leveling equipment, nonagricultural scrapers, general purpose steel buildings, and other equipment which can be used for agricultural or horticultural purposes.

Item 870.45

4. Certification of actual-use is accepted from importers and manufacturers of 666.00 equipment after the imported parts are used in the assembly or manufacture of 666.00 equipment. The certifying party must be able to show that the imported articles were shipped to the manufacturer's plant, were entered into its inventory, and were withdrawn for production purposes. Acceptable FIFO accounting procedures are sufficient to identify use of the imported articles.

5. Replacement parts for 666.00 equipment may be certified as to actual-use by an importer if he submits evidence that a) the parts are specially designed for the 666.00 equipment and other uses are merely fugitive, b) and the parts have been sold by the importer to other distributors of the replacement parts or to actual end-users. Certification of actual-use may be made at entry if the parts are the subject of an existing contract of sale by the importer to such distributors or users.

6. Replacement parts which have possible application to equipment not provided for in item 666.00 may be certified as to actual-use by an importer if he submits evidence that a) the imported parts are identified by a replacement part number or catalogue for specific application to 666.00 equipment, and b) have been sold to factory-authorized or similar retail or wholesale distributors of replacement parts for the specific 666.00 equipment.

7. Certification of actual-use for replacement parts which have application to multiple types of equipment and machinery would normally be acceptable from an importer only if the importer has knowledge of each end-user or if the importer can submit statements of use from each end-user. If, however, an importer can identify a distributor, to whom all or part of the imported articles are sold, as one who sells only replacement or repair parts for 666.00 equipment, then certification would be acceptable.

These guidelines permit certification of actual-use by an importer for many situations before the imported articles reach the end-users. This position is based on two primary determinations. First, evidence of a sale to an appropriate end-user or distributor is sufficient evidence of actual-use even though the articles have not yet been delivered. The articles have been entered into the chain of commerce which will result in the required end-use. Second, certain practical considerations are necessary to make items 870.40 and 870.45 economically viable preferential provisions intended by Congress. Evidence of the nature of the articles, method of distribution, and other commercial data will be sufficient in most cases to permit certification of actual-use at the time the articles are entered into the commercial channels which lead to the desired end-use. If an importer cannot demonstrate that the normal course of trade for the articles in question will result in the intended actual-use as required by item 870.40 or 870.45, then the importer will have to trace the articles further along the distribution route before certification of actual-use can be made.

These guidelines do not propose to cover all situations. Not every article intended for agricultural or horticultural purposes will necessarily be given duty-free treatment. Congress has even stated that despite the overriding intent to provide duty-free treatment for agricultural articles, some articles will not be included. However, these guidelines are intended to give effect to the intent of 870.40 and 870.45 by reducing the economic and administrative burden on both importers and the Customs Service.

Attachment A to this letter gives background information which further explains the reasons for issuing the guidelines. Attachment B is a sample format for a certificate of actual-use.

408-922 O - 83 - 2

ATTACHMENT A.—BACKGROUND INFORMATION

The Trade Agreements Act of 1979, Public Law 96-39, July 26, 1979, enacted two new classification provisions applicable to certain machinery, equipment, implements, and parts:

870.40 Machinery, equipment, and implements to be used for agricultural or horticultural purposes.

870.45 Parts to be used in articles provided for in items 666.00, whether or not such parts are chiefly used as parts of such articles and whether or not covered by a specific provision within the meaning of General Interpretive Rule 10(ij)

These provisions are actual-use provisions within the meaning of General Headnote and Interpretive Rule 10(e)(ii), TSUS, which states:

> (e) In the absence of special language or context which otherwise requires—
>
> * * * * * * *
>
> (ii) A tariff classification controlled by the actual-use to which an imported article is put in the United States is satisfied only if such use is intended at the time of importation, the article is so used, and proof thereof is furnished within 3 years after date the article is entered; * * *

Since the effective date for items 870.40 and 870.45, TSUS, there has been a growing concern over what will constitute sufficient proof as to actual use of articles imported under these provisions. The Customs Regulations at sections 10.131 to 10.139 (19 CFR 10.131-10.139) govern the actual-use provision. Section 10.137 requires the importer to keep accurate and detailed records showing the use or other disposition of imported merchandise for which a claim of actual-use is made. Section 10.138 addresses that proof of use and states:

§ 10.138 Proof of Use

> Within 3 years from the date of entry or withdrawal from warehouse for consumption, the importer shall submit in duplicate in support of his claim for free entry or for a reduced rate of duty a certificate executed by (1) the superintendent or manager of the manufacturing plant, or (2) the individual end-user or other person having knowledge of the actual use of the imported article. The certificate shall include a description of the processing in sufficient detail to show that the use contemplated by the law has actually taken place. A blanket certificate covering all purchases of a given type of merchandise from a particular importer during a given period, or all such purchases with specified exceptions, may be accepted for this purpose, provided the importer shall furnish a statement showing in detail, in such manner as to be readily identified with each

entry, the merchandise which he sold to such manufacturer or end-user during such period.

There are several key considerations expressed by the Congress. First, there was the concern that the new tariff provisions would create a tariff loophole, and would erode the specific provisions of the Tariff Schedules by inadequate administration of the end-use test. To this extent, the Congress indicated that Customs should review its regulations. There was also the implication that actual-use certificate forms would be obtained from Customs at the time of entry.

Notwithstanding these concerns expressed by the Congressional committees, the purpose of the enacted legislation was to favor importations of articles to be used in agricultural or horticultural pursuits. This interest is not new. The courts have recognized and consistently construed duty-free provisions for agricultural articles in a broad and liberal manner in order to give effect to intent of Congress to favor agriculture.

Items 870.40 and 870.45, TSUS, present actual use situations that do not always fit within what may be called the "standard" actual-use situation. Actual-use provisions were intentionally limited in number when the current Tariff Schedules were drafted. The actual-use provisions included in the Tariff Schedules usually provide for articles which are to be used by a limited number of processors or manufacturers rather than by a large number of end-users. Examples of actual-use provisions in the Tariff Schedules prior to items 870.40 and 870.45 are as follows.

1. 110.47: Frozen meat, skinned and boned, in 10 pound blocks to be minced, ground, or cut into uniform pieces.
2. 131.37: Patna, cleaned, for use in manufacture of canned soups.
3. 155.40: Certain sugars for use other than for commercial extraction of sugar or for human consumption.
4. 176.44: Rapeseed oil, rendered unfit for food, to be used in making rubber substitutes or lubricating oil.
5. 176.46: Other rapeseed oil to be used in making rubber substitutes or lubricating oil.
6. 184.58: Wheat gluten to be used as animal feed.
7. 250.04: Flax and hemp fibers to be used in papermaking.
8. 306.00: Certain wools entered by a dealer, manufacturer, or processor for certain named uses.

The burden placed on an importer of replacement parts for articles classified in item 666.00, however, is often economically and administratively infeasible. For example, a shipment of 1,000 replacement hydraulic cylinders for use on certain plows and other farm equipment would theoretically require an importer to obtain statements from 1,000 individual end-users before certification of actual-use would be acceptable. More often that not, the cylinders will be sold through one or more levels of distribution before reaching an

end-user. Because of this, some importers have either decided not to claim 870.45 or have failed to get statements from the end-user.

Competing interests do exist. On the ond hand, there is the interest which requires Customs to insure that the duty-free benefits are given to those engaged in agricultural or horticultural pursuits:

> The committee is concerned that the adoption of the "end-use" test with respect to parts of agricultural and horticultural machinery, equipment, and implements will not again result in the erosion of specific provisions of the tariff schedules by inadequate administration of the chief use provision in classifying such parts for duty purposes. * * * It believes that the Customs Service should review its regulations with regard to the end-use test in order to prevent importers from establishing a practice of classifying parts for end-use purposes where the duty-free treatment of such parts is not warranted by the facts. Moreover, Congress intends that the two departures from the "chief use" test and from the provisions of Rule 10(ij) not be interpreted by the Customs Service as an indication that the Congress is agreeing to permit the Customs Service to depart from the provisions of 10(ij) in any other respect. The end-use test not only is contrary to the concept of classification under 10(ij), it can destroy the ability of the Customs Service and other agencies to determine the volume of imports of articles which have broader application than parts of particular vehicles and machinery. (Page 128 of House Report No. 96-317, July 3, 1979).
>
> The actual-use requirements of General Headnote 10(e)(ii) will apply to item 870.40. The President's statement of administrative action notes that the requirements of Headnote 10(e)(ii) will be implemented by the Customs Service through "a certification system for confirming the actual-use of the item. This may involve actual-use certificates which will be obtained upon entry and returned within a specified period of time." The Committee is concerned about the potential for use of new item 870.40 as a tariff loophole and expects the Customs Service to enforce rigorously the requirements of Headnote 10(e)(ii) to protect the revenues. (Page 183 of Senate Report No. 96-249, July 17, 1979).

However, the enforcement of the provisions must not be so burdensome that the provisions are ineffective in providing duty-free benefits. Therefore, these interests must be balanced.

The Customs regulations in section 10.138 (19 CFR 10.138) contain the requirement that a proof of use must be made by certificate executed by 1) the superintendent or manager of the manufacturing plant, or 2) the individual end-user or other person having knowledge of the actual-use of the imported article. An importer of replacement parts entered under item 870.45 often "knows" that these parts will be used within the terms of 870.45, but knowledge of the actual time and place of use is either uneconomical or impractical to obtain. Therefore, in order to develop reasonable certi-

fication requirements in light of the intent of the law in items 870.40 and 870.45, new regulations may have to be drafted for articles entered under these provisions. A determination has not yet been made on the need for changes in the regulations. The guidelines should be used, until that time, as the proper basis for accepting certifications of actual use.

(November 29, 1982)

ATTACHMENT B.—CERTIFICATION OF ACTUAL USE FOR ARTICLES ENTERED UNDER ITEM 870.40 OR 870.45, TARIFF SCHEDULES OF THE UNITED STATES

1. Entry No.:
2. Description of articles:
3. Intended use within the scope of either item 870.40 or 870.45:
4. Uses other than permitted uses under 870.40 or 870.45 which are uses known in commerce for the imported article:

a. Other than in agricultural or horticultural pursuits:
b. Other than as parts for agricultural equipment classified in 666.00:

5. What evidence is used to support this certification? (*e.g.*, statements from end-users, contract of sale to end-users, manufacturer's records, distribution into specific channels of commerce which result in the intended end-use, etc.)
6. Identify the distribution network for the imported articles:
7. Other relevant information and evidence supporting this certification:
8. Name of certifying party and authority to certify:

Signature:

Address:

(C.S.D. 83-33)

This ruling holds that the bonded carrier who receipts for the merchandise is liable for the proper transportation of the merchandise. Sections 18.1(a)(1), 18.1(a)(2), 114.22(c), 18.11(b), and 18.20 of the Customs Regulations are applicable in the instant case

Date: December 1, 1982
File: TRA-8-01 CO:R:E:E
719896 M

This ruling concerns the party liable under a transportation in-bond entry for the proper transportation of the merchandise.

Issue: Is the consignee who filed the transportation entry in his name, or the bonded carrier shown on the entry who receipts for the goods, liable for the proper transportation of the merchandise?

Facts: A Canadian carrier notes that it is responsible for carrying merchandise from Canada to Detroit. At Detroit, this carrier transfers the merchandise to an American bonded common carrier for delivery in-bond to the port of final destination in the United States.

The Canadian carrier files with Customs at Detroit a Customs Form 7512 for such merchandise showing that the merchandise was "entered or imported" by itself (the Canadian carrier) "to be shipped in-bond via" the American bonded common carrier. The Canadian carrier will sign the declaration statement attesting to the accuracy of the information, whereas the American bonded common carrier will receipt from Customs for the goods.

The Canadian carrier notes that Customs varies at the ultimate ports of destination as to which party is liable for any shortages occuring under section 18.8(a), Customs Regulations, during the course of the transportation movement. Some ports of entry believe that the entrant (the Canadian carrier) is liable for such shortages, whereas other ports of entry consider the American bonded common carrier liable.

A broker likewise informs us that when the party who is shown on the transportation entry as importing or entering the goods differs from the party shown on the transportation entry as responsible for transporting the goods in-bond, there is a divergence in the field regarding the party responsible for the proper transportation of the merchandise. This is true, whether transportation entry is an immediate transportation entry or a transportation and exportation entry. The broker contends that in his opinion the language near the top of the Customs Form 7512 "Entered or imported by" serves no useful purpose, but instead causes confusion and results in a lack of uniform treatment. He, therefore, suggests that the language should be eliminated from the Customs Form 7512.

Law and analysis: Section 18.1(a)(1) of the Customs Regulations, in pertinent part, provides that merchandise to be transported from one port to another in the United States in bond shall be delivered to a common carrier, contract carrier, freight forwarder, or private carrier bonded for that purpose, but such merchandise delivered to a common carrier, contract carrier, or freight forwarder may be transported with the use of facilities of other bonded or nonbonded carriers. Section 18.1(a)(2), in effect, provides that if such merchandise is to be transported under cover of a TIR carnet, the same rule as set forth in section 18.1(a)(1) applies, except that the TIR carnet shall be responsible for liability incurred in the carriage of the merchandise under the carnet, whereas, the carrier's bond of the carrier who receipts for the merchandise shall be liable in accordance with section 114.22(c) of the Customs Regulations

only for the total of duties and takes on any shipment which exceeds the amount which the guaranteeing association is liable.

Section 18.11(b) of the Customs Regulations provides that an entry for immediate transportation without appraisement may be made by:

(1) The carrier bringing the merchandise to the port of arrival,

(2) The carrier who is to accept the merchandise under its bond or a TIR carnet for transportation to the port of destination, or

(3) Any person shown by the bill or lading or manifest, a certificate of the importing carrier, or by any other document satisfactory to the District Director of Customs, to have a sufficient interest in the merchandise for that purpose.

The last sentence of section 18.20 of the Customs Regulations applies the same requirement for filing immediate transportation entries to transportation and exportation entries. This sentence provides that "acceptance of transportation and exportation entries shall be subject to the requirements prescribed in section 18.11(b) for entry of merchandise for immediate transportation without appraisement."

In reviewing the above regulations, we believe that the following conclusions may be drawn. First, the bonded carrier who receipts for the merchandise is liable for the proper transportation of the merchandise. This is because section 18.1(a)(1) states that such merchandise must be delivered to an appropriate carrier "bonded for that purpose." As further evidence of this fact, section 18.1(a)(2) which sets forth the exception for merchandise transported under carnet, provides that the bonded carrier who receipts for the goods is liable for the total of duties and taxes on any shipment which exceeds that covered by the carnet. This would indicate that if a carnet is not involved the bonded carrier would be liable for the entire amount.

Furthermore, section 18.11(b)(3) provides that any person who may have a sufficient interest in the merchandise may file a transportation entry. Such a person may not be a carrier and may not be able to obtain a bond that would sufficiently cover the transportation of the merchandise. The reason for permitting such a person to file the transportation entry is that Customs desires for the person entering the merchandise to have sufficient knowledge of the merchandise because he is attesting to the accuracy of the information set forth on such transportation entry and that all the requirements have been met. Thus, as pointed out in Manual Supplement 3511-02 dated July 31, 1981, as amended by Manual Transmittal 3500-12 dated July 7, 1982, it is the responsibility of the party filing the transportation entry to make sure that all bond requirements for any in-bond entry are met. As an aside, this becomes extremely important regarding transportation and exportation entries concerning the bond coverage for the exportation of such merchandise.

The bonded carrier by receipting for such merchandise acknowledges his responsibility to transport such merchandise, and thus obligates his carrier's bond.

Holding: The bonded carrier shown on the Customs Form 7512 as the shipper of the goods under his bond is liable for the proper transportation of the merchandise when he receipts for such goods.

(C.S.D. 83–34)

This ruling holds that an instrument entering the U.S. to be tested for compliance with Food and Drug Administration requirements pursuant to 21 CFR Part 812 may not enter the country free of duty under item 851.60, TSUS

Date: December 17, 1982
File: CON 5–02 CO:R:E:E
720803 KP

This ruling concerns whether an instrument which enters the United States for investigational purposes pursuant to Part 812 of the Food and Drug Administration Regulations (21 CFR Part 812) may receive duty-free treatment under item 851.60, Tariff Schedules of the United States (TSUS).

Issue: Is an instrument which is imported for testing purposes in order to obtain approval of the Food and Drug Administration (FDA) for its commercial distribution in the United States eligible for duty-free entry into the U.S. under item 851.60, TSUS?

Facts: Part 812 of the FDA Regulations (21 CFR Part 812) permits the entry of certain devices into the United States for testing to determine whether they comply with the laws and regulations under the domain of the FDA. If, as a result of such tests, the FDA approves the device, it may be promoted, test marketed, sold, or otherwise commercialized in the United States.

An American corporation imports devices covered by 21 CFR Part 812 for nonprofit institutions, which test them for compliance with FDA requirements. Frequently, the devices are classifiable under one of the TSUS provisions listed in Headnote 6(a), Part 4, Schedule 8 of the Tariff Schedules, and therefore, they are "instruments or apparatus" within the meaning of item 851.60, TSUS. Consequently, the nonprofit institutions for whom these articles are imported would like to enter them into the U.S. free of duty under that tariff provision.

Law and analysis: Item 851.60, TSUS, provides for duty-free entry of instruments and apparatus (as defined in Headnote 6(a), Part 4, Schedule 8, TSUS) entered for the use of any nonprofit institution, whether public or private, established for educational or scientific purposes, if no instrument or apparatus of equivalent scientific value for the purposes for which the instrument or appara-

tus is intended to be used is being manufactured in the United States.

Part 301 of the Commerce Regulations (15 CFR Part 301) sets forth the regulations applicable to the duty-free importation of merchandise under item 851.60, TSUS. 15 CFR 301.4(a) lists three determinations which must be made by the Customs Service before an application for duty-free entry under item 851.60, TSUS, may be forwarded to the Department of Commerce for further consideration. One such determination, provided for in 15 CFR 301.4(a)(3), is:

> Whether the instrument which is the subject of the application is intended for the exclusive use of the applicant institution and is not intended to be used for commercial purposes. For the purposes of this section, commercial uses would include, but not necessarily be limited to: * * * any use by or for the primary benefit of a commercial entity; * * *

If any of the determinations made by Customs concerning a particular application are in the negative, that application is deemed to be outside the scope of Public Law 89–651, the Educational, Scientific, and Cultural Materials Importation Act of 1966 (which added item 851.60, TSUS, to the Tariff Schedules), and the request for duty-free entry of the subject instrument must be denied.

In the instant situation, nonprofit institutions import instruments to test them for compliance with FDA requirements. If a device passes the tests, the foreign manufacturer acquires a new market for his merchandise. Even when a device does not pass the tests, the manufacturer gains knowledge as to what he must do to make the device comply with the pertinent laws and regulations so that he can market it in the U.S. in the future. Thus, the foreign manufacturer receives the primary benefit of these importations, notwithstanding that the institution which performs the tests has used and may continue to use the instrument for research purposes. Therefore, under 15 CFR 301.4(a)(3), instruments imported under the immediate circumstances are considered used for commercial purposes. Hence, such importations do not fall within the purview of the Educational, Scientific, and Cultural Materials Importation Act of 1966. Consequently, the instruments may not be afforded duty-free treatment under item 851.60, TSUS, upon entering the United States for FDA testing purposes by a nonprofit institution.

Holding: An instrument which is imported for testing purposes in order to obtain FDA approval for its commercial distribution in the United States may not enter the country free of duty under item 851.60, TSUS, because such importations are considered to be for commercial purposes.

408-922 O - 83 - 3

This ruling holds that the crab processing machinery installation is an addition to the hull and fittings of the fish processing vessel and should be liquidated as non-dutiable. Oil tankers, relocation of fish grinder, mezzanine extension, steel supplied, steel for fish holds, and lifting beam installation are non-dutiable alteration items. Exhaust fans, painting of vessel's name on stern, filter additions, electrical additions, installation of equipment on roof, valve adjustment and spiral freezer speed adjustment are dutiable repair/maintenance or equipment items.

Date: December 28, 1982
File: VES-13-18-CO:R:CD:C
105807 JL

To: Vessel Repair Liquidation Unit, San Francisco, California.
From: Director, Carriers, Drawback & Bonds Division.
Subject: Application for Further Review of Protest No. 31-262-000005, June 7, 1982, (company name); regarding V/R entry No. 100847, February 27, 1980, (vessel name).

The above-referenced case was referred to this office for advice by memorandum of September 7, 1982, your file PRO-4-0; CVLW. On October 1, 1982, the attorney for the protestant, (Mr. Blank), had a conference at the Carrier Rulings Branch on the case. He presented no new matter at the conference, merely restating the highlights of his client's position which are:

1. The expenditures at issue are not subject to duty under 19 U.S.C. 1466(a) because the vessel was not "fully documented" to engage in trade and it did not, in fact, engage in trade.
2. The expenditures at issue are not subject to duty under 19 U.S.C. 1466(a) because they are not for repairs, repair parts, or equipments.

The arguments advanced by the protestant on the first issue are basically that because the vessel did not have a certificate of inspection issued by the U.S. Coast Guard it could not engage in foreign trade even though it had a register; the possession of a register is not determinative of the application of section 1466 to a vessel (citing T.D. 48136, C.D. 4390, legislative history of 19 U.S.C. 1466(e), distinguishing *Elizabeth River Terminals,* 509 F. Supp. 512).

The Customs Service has always taken the position that the conjunctive phrase contained in 19 U.S.C. 1466(a), "A vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade", means that the vessel repair statute levies a duty on expenditures for American vessels which are *either* documented to engage in foreign or coastwise trade *or* are non-documented but nonetheless intended to engage in foreign or coastwise trade. The courts have in a few instances disagreed with this interpretation, particularly in

two cases cited by the protestant; *Corpus* (C.D. 4390) and *Standard Dredging* (T.D. 48136). The *Corpus* decision was overruled as to all post 1971 section 1466 amendment (subsection (e)) entries by the Court of International Trade in *Elizabeth River Terminals* (509 F. Supp. 512).

The U.S. Court of Appeals for the Federal Circuit in a case decided October 28, 1982, *South Corporation and Seal Fleet Inc., v. U.S.* Appeal No. 82-19, fully explored the issues raised here and disposed of them as follows:

(a) The coverage of section 1466 is clearly conjunctive and the election not to utilize a vessel in trade is irrelevant if it is documented.

(b) If section 1466(a) did not impose duties on documented vessels which were not utilized in trade prior to the amendment of the statute in 1971 then there would have been no purpose in the amendment; therefore the coverage did extend to those vessels then, as now.

(c) The whaling vessel cases which held that the repair statute did not apply to that class of ships gave effect to a specific statute exempting them from coverage, and are not precedents for exempting any other class of vessel from duties.

(d) Statutes exempting oceanographic research vessels from inspection and personnel protection laws have no bearing on statutes involving the assessment of duties.

Item (d) is partially applicable to an argument raised in the protest, to wit, that the vessel at issue could not have obtained a clearance to a foreign port because it did not have a certificate of inspection from the Coast Guard. This lack of certificate is characterized as putting the vessel in the status of being "not fully documented", and therefore not within the ambit of section 1466. The term "documented" means registered, enrolled and licensed, or licensed by the U.S. Coast Guard. See section 4.0(c), Customs Regulations. In our opinion, a certificate of inspection is not a "document" for purposes of the vessel repair statute. Additionally, the Coast Guard Regulations, as amended on June 24, 1982, to implement P.L. 96-594, now list the following types of license (forms of documentation): Registry, Coastwise license, Great Lakes license, Fishing license, and Pleasure license. See 46 CFR sections 67.17-3 through 11. We observe that in no part of 46 CFR is a certificate of inspection mentioned as a condition of obtaining documentation or as a form of documentation (license).

(2) The protestant has appended to the protest a list of 26 expenditures which are claimed to be "Additions and modifications to vessel," and thus not dutiable. He cites two of the leading cases on the subject of vessel equipment versus hull and fittings modifications or alterations, i.e., T.D. 44359 (*Admiral Oriental Lines*) and T.D. 36489 (*Otte*). His conclusion is as follows:

> The machinery installed to enable the (vessel name) to engage in crab processing is permanently attached to the vessel, and is necessary for the vessel to carry out its function. This machinery is not portable; it would remain on the vessel if the vessel was in port for a significant period of time. In addition, the installation of the crab processing machinery necessitated substantial modifications to existing structures which would not otherwise have been necessary.

In case 104279 (December 20, 1979), the installation of crab processing equipment was held to be a dutiable expenditure as "equipments" under section 1466. The file in that case discloses that the vessel was extensively modified; in fact the vessel was to be cut in two and both lengthened and widened. As in the instant case, the vessel in case 104279 was a fish processor before and after the foreign shipyard work.

The characterization of an article as vessel equipment, as opposed to fittings or hull/structural parts, is manifestly difficult in cases where the article has many of the attributes of both classes cited in the leading cases. For example, because a vessel pitches and rolls when at sea all radio gear is securely fastened, yet is classified as equipment even when such articles are usually too large to be considered (in ordinary parlance) "portable". Whether an article is "permanently attached" to a vessel, as is claimed in this case, is likewise difficult to ascertain. The machinery in case 104279 is, presumably, essentially identical to that in the instant case yet it was installed as a replacement. That the installation of this machinery entailed some modification to existing structures is relevant but, the extent of such modifications will of necessity vary from vessel to vessel. The decision in each case of this type is to a great extent dependent upon the detail and accuracy of the drawings and invoice descriptions of the actual work performed. In this case, a detailed set of invoices from the shipyard and an article from *Food Engineering* magazine, March 1979, issue, containing detailed cutaway drawings and descriptive text of the barge have been supplied.

After reviewing those documents, we are of the opinion that the crab processing machinery installation is an addition to the hull and fittings of the (vessel name). Accordingly, items 1, 14, 20, 21, and 25 should be liquidated as non-dutiable. Additionally, items 3 (oil tanks), 6 (relocation of fish grinder), 9 (mezzanine extension), 10 (steel supplied), 11 (steel for fish holds), and 15 (lifting beam installation) are non-dutiable alteration items. Items 2 (exhaust fans), 4 (painting of vessel's name on stern), 5 (filter additions), 13 (electrical additions), 16 (installation of equipment on roof), 17 (valve adjustment), and 18 (spiral freezer speed adjustment) are dutiable

repair/maintenance or equipment items. Regarding items 7, 8, 22, 23, and 24, not enough information has been furnished. The protestant should be afforded an opportunity to make additional submissions on these items.

Please inform the protestant of our decision.

Customs Service

Proposed Rulemaking

(19 CFR Part 133)

Proposed Customs Regulations Amendments Relating to Copyrights

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations concerning the recordation of copyrights with the Customs Service and importations in violation of the copyright laws. The changes would conform the regulations to an extensive revision of the United States copyright laws made by the Copyright Act of 1976. The proposed changes include: (1) shortening the term of copyright recordation with Customs; (2) treatment of new requirements applicable to copyrighted works manufactured outside the United States or Canada, and (3) a new provision allowing for the return of infringing articles to the country of export.

DATES: Comments (preferably in triplicate) must be received on or before October 5, 1983.

ADDRESS: Comments should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Legal Aspects: Samuel Orandle, Entry, Procedures and Penalties Division (202-566-5765);

Operational Aspects: Harrison C. Feese, Duty Assessment Division (202-566-8651); U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

Background

The copyright laws of the United States were substantially revised by the Copyright Act of 1976, Pub. L. 94-553, 17 U.S.C. 101-

810 ("the Act"), effective January 1, 1978. Several provisions of the Act directly affect procedures of the Customs Service ("Customs") relating to copyrights.

Section 601 of the Act substantially revises the requirements applicable to works manufactured outside the United States or Canada which may be copyrighted by American authors or foreign nationals domiciled in the United States. Section 603 makes important changes concerning the importation of articles which infringe copyrights protected in the United States. Under section 603(b), the copyright owner may seek to prevent importation of an article which he claims infringes the copyright by obtaining a court order prohibiting importation, or, if the copyright has been recorded with Customs, by seeking exclusion through an administrative procedure. Section 603(c) provides that articles imported in violation of the Act may be seized by Customs. However, Customs may authorize infringing articles to be returned to the country of export if the importer can show he had no reasonable grounds for believing his actions violated the Act.

Because of these changes in the copyright laws, it is necessary to make conforming changes to the Customs procedures contained in Part 133, Customs Regulations (19 CFR Part 133), relating to the recordation of copyrights with Customs and importations violating copyright laws.

In a related matter, a suit was recently filed by the Authors League of America against the Registrar of Copyrights, Secretary of the Treasury, and Commissioner of Customs. The League sued for a declaratory judgment that the Manufacturing Clause of the Copyright Act, sections 601 and 603(a) and (c), violates the First and Fifth Amendments of the Constitution and is invalid, and to enjoin the Government from enforcing its provisions. See *The Authors League of America Inc. and Irwin Karp,* v. *David L. Ladd, et al.*—U.S. District Court, Southern District of New York, 82 Civil 5731.

Discussion of Proposed Changes

1. Section 133.31, Customs Regulations, provides that claims to copyrighted works may be recorded with Customs if the works are entitled to protection under the Copyright Act of July 30, 1947, as amended, or if they are protected under the Universal Copyright Convention ("the UCC"). Section 104 of the Copyright Act of 1976 extends protection not only to works protected by the UCC, but also to works protected by other conventions and treaties by which the United States has agreed to be bound and those works that come within the scope of a Presidental proclamation. Therefore, it is proposed to amend section 133.31 to reflect the broader statutory protection.

It is also proposed to amend section 133.31(b) to provide a clearer understanding of those persons eligible to record copyrights with

Customs. The existing regulation provides that the copyright proprietor, or any person claiming actual or potential injury because of unauthorized importations of the work, may record the copyright. Section 133.33, however, requires that an applicant for recordation furnish proof of his ownership interest if he is not the person named on the certificate of registration issued by the U.S. Copyright Office. Therefore, Customs believes it would be helpful to amend section 133.31(b) to provide that only the copyright proprietor or persons who have gained an ownership interest in the copyright and claim actual or potential injury from unauthorized importations may record the copyright with Customs.

To conform to the proposed amendments to section 133.31, it is proposed to delete references to the UCC in sections 133.32(e) and 133.33(a)(1), Customs Regulations, so as not to restrict the protection available under section 105 of the Act. The requirement for a statement that all copies of a copyright work contain the UCC notice, required by section 133.32(e), has been eliminated. Accordingly, it is proposed to delete this requirement from the regulations.

Section 302 of the Act provides generally that works created on or after January 1, 1978, may be copyrighted for a nonrenewable term equal to the life of the author plus 50 years. If works are made for hire, the copyright lasts for 75 years from the year the work is first published, or 100 years from the year of its creation, whichever period is shorter. In addition, Section 304 of the Act provides that copyrights in their first terms shall endure for 28 years from the date it was originally secured. Copyrights in their renewal term on January 1, 1978, have had their expiration date extended to 75 years from the date the copyright was originally secured. Under these circumstances, it would be difficult, if not impossible, for Customs to be aware of the expiration dates of all recorded copyrights and to remove references to expired copyrights from the files. Therefore, it is proposed to retain the existing procedure whereby copyrighted works may be recorded with Customs, but to shorten the time for which a recordation is effective from 28 years to 20 years, or until the recordant's ownership interest expires, whichever is shorter. The existing 28-year term corresponds to the 28 years for which a copyright was valid under the previous copyright law. Because the Act has changed the duration of copyrights, the 28-year period no longer is of significance. Customs believes a 20-year term would be preferable because it would correspond to the 20-year term during which trademarks recorded with Customs are protected.

Customs also would provide for renewals of recordation at 20-year intervals, extending protection for another 20 years, or until the recordant's ownership interest expires, whichever period is shorter.

Because the terms of copyrights will differ according to whether the work was first copyrighted before or after January 1, 1978, provision must be made for different kinds of documentary evidence to be submitted with the renewal application. For works copyrighted before January 1, 1978, it is proposed to require a certificate of registration or a certificate of renewal registration issued by the Copyright Office, depending upon whether the 20-year recordation must be renewed before or after expiration of the original 28-year copyright term. For works copyrighted on or after January 1, 1978, it is proposed to require an affidavit by the recordant attesting to the continued validity of the copyright, stating such facts as whether the author of the work is still alive, and if not, the date of his death. It is proposed to amend sections 133.34(b) and 133.37, Customs Regulations, to implement these changes.

4. Section 133.37, Customs Regulations, provides that applications for renewal of recordation must be made no later than three months from the expiration of the original recordation. Because of this wording, it is not clear whether recorded copyrights are protected during the time after their recordation has expired but before the end of the three-month grace period. Moreover, because of the time needed to process an application for renewal, several months may pass until notice of renewal can be sent to all Customs field offices. Customs believes that elimination of this grace period would prevent confusion from arising over the validity of a recordation after its expiration date. Therefore, it is proposed to amend section 133.37 to require that applications for renewal of recordation be submitted no later than three months *before* the expiration date of the term then in effect.

5. Section 106 of the Copyright Act of July 30, 1947, prohibited the importation of articles bearing a false notice of copyright. Although section 506 of the Act provides that any person who, with fraudulent intent, imports any article bearing a false notice of copyright has committed a criminal offense and is subject to a fine or imprisonment, the importation of articles bearing a false notice of copyright is not specifically prohibited. Because questions of fraudulent intent in cases of this nature cannot possibly be determined by Customs, it is proposed to delete section 133.41, Customs Regulations, which provides that the importation of articles bearing a false notice of copyright is prohibited and that the articles shall be seized and forfeited.

6. Section 133.43(c)(2), Customs Regulations, provides that a detained importation of an allegedly infringing article shall be released if the copyright owner "concedes that he possesses insufficient evidence" or proof to substantiate a claim of infringement. Because section 603 of the Act requires the person seeking exclusion of an allegedly infringing article to furnish proof of his claim, it is proposed to amend section 133.43(c)(2) by substituting "fails to

present sufficient evidence" for "concedes that he possesses insufficient evidence".

7. Section 16 of the Copyright Act of July 30, 1947, provided that works by American citizens had to be manufactured in the United States to receive copyright protection. However, section 601 of the Act allows works by American citizens or foreign nationals domiciled in the United States to be manufactured either in the United States or Canada. In addition, the number of noncomplying copies that may be imported has been increased from 1,500 to 2,000 copies. Moreover, only "preponderantly nondramatic literary works" are subject to the new manufacturing requirements. Therefore, it is proposed to revise section 133.45, Customs Regulations, to reflect the new requirements.

8. Section 603(c) of the Act authorizes the return of infringing articles to the country of export if the importer can show he had no reasonable grounds for believing his actions violated the Act. The Copyright Act of July 30, 1947, required that articles imported in violation of that Act be seized and forfeited by Customs. It is proposed to amend sections 133.42(c) and 133.44(a), and to add a new section 133.47, to implement the new provision.

Executive Order 12291

This document will not result in a regulation which is a "major rule" as defined by section 1(b) of Executive Order 12291. However, if convincing public comments are received on the issue a "final" regulatory impact analysis will be prepared under the Executive Order.

Regulatory Flexibility Act

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis are not applicable to the proposal because the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Any economic impact flows directly from the Copyright Act of 1976 and not the proposed conforming regulations.

Accordingly, it is hereby certified under the provisions of section 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

Comments

Before adopting these amendments, consideration will be given to any written comments that are submitted timely to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch,

U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Drafting Information

The principal author of this document was Jesse Vitello, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Authority

The authority for these amendments is R.S. 251, as amended (19 U.S.C. 66), section 624, 46 Stat. 759 (19 U.S.C. 1624), and section 603, 90 Stat. 2590 (17 U.S.C. 603).

Lists of Subjects in 19 CFR Part 133

Trademarks, tradenames, copyrights, and imports.

Proposed Amendments

It is proposed to amend Part 133, Customs Regulations (19 CFR Part 133), as set forth below:

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. It is proposed to revise paragraphs (a) and (b), of section 133.31 to read as follows:

§ 133.31 Recordation of copyrighted works.

(a) *Eligible works.* Claims to copyright which have been registered in accordance with the Copyright Act of July 30, 1947, as amended, or the Copyright Act of 1976, and unregistered claims to copyright in works entitled to protection under the Universal Copyright Convention, Presidential proclamation, or as otherwise provided by section 104 of the Copyright Act of 1976 (17 U.S.C. 104), may be recorded with Customs if the copyright is subsisting. Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

(b) *Persons eligible to record.* The copyright proprietor, or any person who has acquired an ownership interest in the copyright through license, assignment, or otherwise, and claims actual or potential injury because of actual or contemplated importations of copies of eligible works, may file an application to record a copyright. A person who has secured a partial ownership interest in a copyright shall be considered a copyright owner to the extent of the interest secured.

2. It is proposed to further amend section 133.31 by removing paragraph (c) and redesignating paragraph (d) as paragraph (c).

3. It is proposed to revise section 133.32 to read as follows:

§ 133.32 Application to record copyright.

An application to record a copyright to secure Customs protection against the importation of infringing copies shall be in writing addressed to the Commissioner of Customs, Washington, D.C. 20229, and shall include the following information:

(a) The name and complete address of the copyright owner or owners;

(b) If the applicant is a person claiming actual or potential injury by reason of actual or contemplated importations of copies of eligible works, a statement setting forth the circumstances of such actual or potential injury;

(c) The country of manufacture of genuine copies of protected articles.

(d) The name and principal address of any foreign person or business entity authorized or licensed to use the copyright, and a statement as to the use authorized;

(e) The foreign title of the work, if different from the U.S. title; and

(f) In the case of protection claimed under section 104 of the Copyright Act of 1976, a statement setting forth the name of the author, citizenship and domicile of the author at the time of first publication, the date and country of first publication, and a description of the work, including its title.

4. It is proposed to revise paragraph (a)(1) of section 133.33 to read as follows:

§ 133.33 Documents and fee to accompany application.

(a) *Documents.* The application for recordation shall be accompanied by the following documents:

(1) An "additional certificate" of copyright registration issued by the U.S. Copyright Office. If the name of the applicant differs from the name of the copyright owner identified in the certificate, or from the name appearing in the statement referred to in section 133.32(e), the application shall be accompanied by a certified copy of any assignment, exclusive license, or other document recorded in the U.S. Copyright Office showing that the applicant has acquired an ownership interest in the copyright.

5. It is proposed to revise section 133.33(2) by removing the words "One thousand" in the first and third sentences and inserting, in their place, the word "Five".

6. It is proposed to revise paragraph (b) of section 133.34 to read as follows:

§ 133.34 Effective date, term, and cancellation of recordation.

* * * * * * *

(b) *Term.* The recordation of a copyright shall remain in effect for 20 years unless the ownership interest of the recordant expires before that time. If the ownership interest expires in less than 20 years, recordation shall remain in effect until the interest expires. If the ownership interest has not expired after 20 years, recordation may be renewed as provided in section 133.37.

* * * * * * *

7. It is proposed to revise section 133.37 to read as follows:

§ 133.37 Renewal of copyright recordation.

(a) *Term of renewal.* If a recorded copyright has a term which exceeds the original 20-year recordation, continued Customs protection may be obtained by renewing the recordation. The renewed recordation shall remain in effect for 20 years, unless the recordant's ownership interest expires sooner, in which case it shall remain in effect until the ownership interest expires. There is no limit to the number of times recordation of a subsisting copyright may be renewed.

(b) *Application for renewal.* An application to renew recordation shall be made no later than three months before the date the recordation then in effect expires. The application shall be in writing addressed to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, Washington, D.C. 20229.

(c) *Materials to be submitted with application.* An application to renew Customs recordation shall include:

(1) Proof that the recordant's ownership interest is valid. The proof required shall vary with the date that the work was first copyrighted, as follows:

(i) *Works in which copyrights subsists on or after January 1, 1978*—An affidavit signed by the recordant attesting to the continued validity of the copyright, stating the date the copyright was registered with the U.S. Copyright Office, whether the author of the work is still alive and if not, the date of his death, and any additional information that Customs may require of the recordant.

(ii) *Works under statutory copyright on December 31, 1977*—If the copyright is still in its first term when recordation expires, a certificate of registration issued by the U.S. Copyright Office, or, if the copyright has been renewed, a certificate of renewal registration issued by the U.S. Copyright Office.

(2) A statement describing any change of ownership or name of owner, in compliance with sections 133.35 and 133.36, and any change of address of the owner.

(3) Payment of a fee of $80. A check or money order shall be made payable to the U.S. Customs Service.

(d) *Untimely application.* If the recordant fails to submit a renewal application at least three months before the recordation expires, he may not renew the recordation. The recordant shall be required

to reapply to record the copyright in accordance with the procedures and requirements of sections 133.32 and 133.33.

8. It is proposed to further amend Part 133 by removing section 133.41.

9. It is proposed to revise the heading and text of section 133.42 and the parenthetical citation at the end of the section to read as follows:

§ 133.42 Infringing copies.

(a) *Definition.* Infringing copies are actual copies or substantial copies of a recorded copyrighted work, produced and imported in contravention of the rights of the copyright owner.

(b) *Importation prohibited.* The importation of infringing copies of works copyrighted in the United States is prohibited.

(c) *Seizure and forfeiture.* The district director shall seize any imported article which he determines is an infringing copy of a recorded copyrighted work. The district director also shall seize an imported article if the importer does not deny a representation that the article is an infringing copy as provided in section 133.43(a). In either case, the district director also shall institute forfeiture proceedings in accordance with Part 162 of this chapter unless the article may be returned to the country of export as provided in section 133.47. (Sec. 602, 90 Stat. 2589; 17 U.S.C. 602)

10. It is proposed to revise the heading and text of section 133.43 to read as follows:

§ 133.43 Procedure on suspicion of infringing copies.

(a) *Notice to the importer.* If the district director has any reason to believe that an imported article may be an infringing copy of a recorded copyrighted work, he shall withhold delivery, notify the importer of his action, and advise him that if the facts so warrant he may file a statement denying that the article is in fact an infringing copy and alleging that the detention of the article will result in a material depreciation of its value, or a loss or damage to him. The district director also shall advise the importer that in the absence of receipt within 30 days of a denial by the importer that the article constitutes an infringing copy, it shall be considered to be such a copy and shall be subject to seizure and forfeiture.

(b) *Notice to copyright owner.* If the importer of suspected infringing copies files a denial as provided in paragraph (a) of this section, the district director shall furnish the copyright owner a representative sample of the imported article, together with notice that the imported article will be released to the importer unless within 30 days from the date of the notice the copyright owner files with the district director:

(1) A written demand for the exclusion from entry of the detained imported articles; and

(2) A bond, in the form and amount specified by the district director, conditioned to hold the importer or owner of the imported

article harmless from any loss or damage resulting from Customs detention in the event the Commissioner of Customs or his designee determines that the article is not an infringing copy prohibited importation under section 602 of the Copyright Act of 1976 (17 U.S.C. 602). (See section 113.14(ee) of this chapter.)

(c) *Result of action or inaction by copyright owner.* After notice to the copyright owner that delivery is being withheld for imported articles suspected to be infringing copies of his recorded copyrighted work, the district director shall proceed in accordance with the following procedures:

(1) *Demand and bond.* If the copyright owner files a written demand for exclusion of the suspected infringing copies together with a proper bond, the district director shall promptly notify the importer and the copyright owner that, during a specified time limited to not more than 30 days, they may submit further evidence, legal briefs, or other pertinent material to substantiate the claim or denial of infringing copying. The burden of proof shall be upon the party claiming that the article is in fact an infringing copy. At the close of the period specified for submission of evidence, the district director shall forward the entire file, together with a representative sample of the imported articles, and his views or comments, to the Commissioner of Customs or his designee for decision on the disputed claim of infringing copying.

(2) *Infringement disclaimed or unsupported.* If the copyright owner disclaims that the specified imported article is an infringing copy of his recorded copyrighted work, or fails to present sufficient evidence or proof to substantiate a claim of infringement, the district director shall release the detained shipment to the importer and all further importations of the same article, by whomever imported, without further notice to the copyright owner.

(3) *Failure to file demand or bond.* If the copyright owner fails to file a written demand for exclusion and bond as required by paragraph (b) of this section, the district director shall release the detained articles to the importer and notify the copyright owner of the release. The district director shall withhold delivery of all further importations of the same article by the same importer, and notify the copyright owner of each subsequent shipment as provided in paragraph (b) of this section.

(4) *Withdrawal of bond.* At any time before transmittal of the case to the Commissioner of Customs or his designee for decision, the copyright owner may withdraw a bond filed in accordance with paragraph (b) of this section. Before returning the bond to the copyright owner and release of the detained articles, the district director shall require the copyright owner and the importer to file written statements agreeing to hold Customs and the district director harmless for any consequence of the return of the bond and release of the detained articles. After the withdrawal of a bond, the district

director shall release importations of the same article by the same importer without further notice to the copyright owner.

(d) *Alternative procedure: court action.* As an alternative to the administrative procedure described in this section, the copyright owner, whether or not he has recorded his copyright with Customs, may seek a court order enjoining importation of the article. To obtain Customs enforcement of an injunction, the copyright owner shall submit a certified copy of the court order to the Commissioner of Customs, Attention: Entry Licensing and Restricted Merchandise Branch, Washington, D.C. 20229. In addition, if the copyright in question is not recorded with Customs, the copyright owner shall submit the $190 fee required by section 133.33(b) and, if the work is a three-dimensional or other work not readily identifiable by title and author, five photographic or other likenesses reproduced on paper approximately 8" X 10½" in size.

(Sec. 501, 65 Stat. 290; 31 U.S.C. 483a)

11. It is proposed to revise the heading and text of section 133.44 to read as follows:

§ 133.44 Decision of disputed claim of infringement.

(a) *Claim of infringement sustained.* Upon determination by the Commissioner of Customs or his designee that the detained article forwarded in accordance with section 133.43(c)(1) is an infringing copy, the district director shall seize the imported article and either institute forfeiture proceedings in accordance with Part 162 of this chapter or, if the conditions prescribed by section 133.47 are met, return the article to the country of export and return the bond to the copyright owner.

(b) *Denial of infringement sustained.* Upon determination by the Commissioner of Customs or his designee that the detained article forwarded in accordance with section 133.43(c)(1) is not an infringing copy, the district director shall release all detained merchandise and transmit the copyright owner's bond to the importer.

12. It is proposed to revise the heading and text to section 133.45 to read as follows:

§ 133.45 Manufacturing requirements.

(a) *Importation from countries other than Canada prohibited.* (1) Before July 1, 1986, copies of preponderantly nondramatic literary works written in English and protected under United States copyright law and manufactured outside the United States or Canada contrary to the manufacturing requirements of the Copyright Act of 1976 (17 U.S.C. 601) may not be imported during the existence of the United States copyright except as provided in paragraph (b) of this section.

(2) On and after July 1, 1986, copies or works which would have been prohibited entry only under paragraph (a)(1) shall be admitted.

(b) *Exceptions.* The provisions of paragraph (a)(1) shall not apply if:

(1) The author of any substantial part of the non-dramatic literary work is neither a national nor a domiciliary of the United States;

(2) In the case of a work made for hire, a substantial part of the work was prepared for an employer or other person who is neither a national nor a domiciliary of the United States nor a domestic corporation or enterprise;

(3) The nondramatic literary portions of the work have been manufactured in the United States or Canada;

(4) The author of any substantial part of the work, although a citizen or national of the United States, has been domiciled outside the United States continuously for at least one year immediately preceding the date importation is sought;

(5) An import statement issued by the U.S. Copyright Office is filed with Customs, in which case no more than 2,000 copies of a particular work, not including copies entered under paragraphs (b)(6) or (b)(7), shall be allowed entry;

(6) Importation is sought by the Federal Government, a State, or a political subdivision of a State, for use other than in schools;

(7) Importation is for use, and not for sale by:

(i) Any person, with respect to no more than one copy of any work at any one time;

(ii) Any person arriving from outside the United States, with respect to copies in his personal baggage; or

(iii) An organization operated for scholarly, educational, or religious purposes, and not for private gain, with respect to copies for its library;

(8) The copies are reproduced in raised characters for the use of the blind; or

(9) An individual American author has arranged for publication of his work by a foreign rather than a domestic publisher, in accordance with procedures set forth in 17 U.S.C. 601(b)(7); or

(10) The infringing copies are brought into compliance with the requirements of section 133.51(b)(3) (i) and (ii).

(c) *Definitions.*

(1) For the purpose of this section, copies are "manufactured in the United States or Canada" if—

(i) The copies are printed directly from type that has been set, or directly from plates made from this type, and the type has been set and the plates made in the United States or Canada; or

(ii) The making of plates by a lithographic or photoengraving process precedes printing of the copies, and the plates have been made in the United States or Canada; and

(iii) The printing or other final process of producing multiple copies, and any binding of the copies, have been performed in the United States or Canada.

(2) "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico and the organized territories under the jurisdiction of the United States.

(Secs. 101, 601, 90 Stat. 2544, 2588; 17 U.S.C. 101, 601)

13. It is proposed to amend Part 133 by adding a new section 133.47, to read as follows:

§ 133.47 Return of seized articles to country of export.

Articles seized for violations of the Copyright Act of 1976 may be returned to the country of export whenever it is shown to the satisfaction of the district director that the importer has no reasonable grounds for believing that his acts constituted a violation of the Act. If the district director is in doubt as to whether the articles should be returned, the matter may be forwarded to the Commissioner of Customs, Attention: Entry, Licensing and Restricted Merchandise Branch, Washington, D.C. 20229, for decision.

(Sec. 603(c), 90 Stat. 2590, 17 U.S.C. 603(c))

14. It is proposed to revise section 133.51(b)(3) by removing the reference to "(17 U.S.C. 16)" and inserting "(17 U.S.C. 601)" and removing "Copyright Act" and inserting "Copyright Act of 1976."

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 26, 1983.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury

[Published in the Federal Register, July 7, 1983 (48 FR 31245)]

United States Court of Appeals for the Federal Circuit

INDUSTRIAL FASTENERS GROUP, AMERICAN IMPORTERS ASSOCIATION, APPELLANT *v.* UNITED STATES APPELLEE

(Appeal No. 82-30)

(Decided: June 30, 1983)

Before RICH, DAVIS, and NIES, *Circuit Judges.*

DAVIS, *Circuit Judge.*

Industrial Fasteners Group, American Importers Association (appellant or Industrial)[1], appeals the judgment of the United States Court of International Trade (CIT)—together with the denial of appellant's motion for rehearing and vacation of that judgment—in which the CIT affirmed the final, affirmative, countervailing duty determination and order of the International Trade Administration (ITA), United States Department of Commerce, in *Certain Fasteners from India,* 45 Fed. Reg. 48,607 (1980). *See Industrial Fasteners Group* v. *United States,* 525 F. Supp 885, 2 CIT 181 (1981), 542 F. Supp. 1019, — CIT — (1982), slip op. 82-26 (April 19, 1982). Industrial asks review only of that portion of the CIT's decision affirming ITA's holding that the Government of India, via a policy of its Ministry of Commerce (Ministry), provided subsidies to exporters of certain industrial fasteners through the Cash Compensatory Support on Export (CCS) program. We affirm.

I

The events leading to this proceeding began with the filing with ITA of a petition by the Industrial Fasteners Institute of Cleveland, Ohio, on January 30, 1980. ITA then initiated an investigation of certain fasteners from India late in February 1980 by the publication in the Federal Register of a notice of the Initiation of Countervailing Duty Investigation, 45 Fed. Reg. 12,276 (Feb. 25, 1980). At that time, the Embassy of India was notified of the investigation and was requested to respond by March 26, 1980, to a questionnaire which included the following specific questions regarding the CCS program:

[1] Industrial is a trade association, some of whose members import fasteners from India, which participated as an interested party in the administrative countervailing duty proceedings conducted by the International Trade Administration with regard to certain industrial fasteners from India.

"(1) Explain the terms and conditions of the program alleged. How are the amounts of payments determined?
(2) Provide current English language copies of laws, regulations and schedules governing the program;
(3) If the program applies only to designated or approved industries, provide a listing of firms exporting the subject merchandise which have received assistance from the program in 1979, or in the most recent one year period for which information was available, and the amounts received;
(4) If the information in (3) above is not readily available, indicate the total amount paid during the same period to firms exporting the subject merchandise."

India's response to ITA's questionnaire, received on March 26, 1980, stated that exporters of industrial fasteners are eligible to receive CCS of 17.5% of the f.o.b. value of their exported product as a refund of indirect taxes paid but not otherwise refunded.[2] In reply to the pivotal question how the 17.5% figure was established, India stated that it "has reasonably calculated and documented the actual tax experience" and explained that following the Alexander Committee's review of the CCS program on October 23, 1978, India's Ministry informed all Export Promotion Councils (EPCs), including the Engineering Export Promotion Council (EEPC) which oversees manufacturers of industrial fasteners, that it was restructuring the program to compensate fully for all types of indirect taxes paid by exporters on inputs which are not otherwise refunded. All EPCs were requested immediately to collect, compile and make available to the Ministry basic data regarding the products with which the EPCs were concerned. They were told that the following "broad criteria * * * are likely to be accepted by Government for formulation of the new rates:"

(1) (a) Indirect taxes on inputs domestic or imported.
(b) High interest rates on working capital.
(c) High cost of capital goods.
(2) (a) Labor intensive industries.
(b) Product of SSI [small sector industry] and cottage sector.
(c) New products in new markets.
(d) Selected processed food, horticulture and agricultural products.
(e) Commodities and markets which suffer from high and discriminatory freight rates.

The Ministry requested the EPCs to select a representative number of manufacturing and exporting units spread throughout the country and to work out the average incidence of the various non-refundable taxes, duties and levies imposed on inputs entering into the exported products. After receipt of the Ministry's instructions, the EEPC instructed a random number of its approximately 300 members to prepare indirect tax calculations. Replies received

[2] India's response noted that the CCS program is a result of Ministry of Commerce policies rather than law or regulation.

were analyzed and sent to the Ministry, including tax calculations from six industrial fastener manufacturers provided by the EEPC. The Ministry then "carefully scrutinized" the tax data and announced on January 15, 1979 a CCS of 12.5% for industrial fasteners to be provided effective April 1, 1979. After objections by the manufacturers to that figure as too low, the Ministry announced on March 31, 1979, a rate of 17.5% for industrial fasteners exported to the American continent.

Included with the Indian Government's initial response to ITA's questionnaire on the CCS program was an undated "Statement Showing Incidence of Indirect Taxes on F.O.B. Export Value/ Anchor Bolts." Claiming that this statement contained errors, India requested (by subsequent letter of April 7, 1980) the substitution of the "complete study relating to taxes on anchor bolts" which had been prepared by a Calcutta firm of cost accountants. That study, dated March 11, 1980, was said by the accountants to be a "study of indirect taxes payable/paid and its incidence of Cost Structure of Anchor Bolts exported to the U.S.A." It included consideration of (1) sales tax and excise duty on new materials, sulphuric acid and anti-rust oil, and packing material; (2) entry tax on raw materials and hoop iron, leval (sic) and nails; (3) Joint Plant Committee CESS (not otherwise explained); (4) engineering goods export assistance fund levy; (5) steel development surcharge/levy; (6) steel import pooling fund levy; (7) port commissioners levy; (8) port congestion surcharges; (9) compulsory government inspection levy; and (10) interest on duty drawback for a three-month period.

Because ITA determined that India was not a "country under the Agreement" on Subsidies and Countervailing Measures, the countervailing duty investigation was governed by section 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1303 (Supp. V 1981).[3] Section 1303(b) of the 1979 Act provides that countervailing duty "shall be imposed, under regulations prescribed by the administrative authority (as defined in section 1677(1) of the this title), in accordance with subtitle IV of this chapter (relating to the imposition of countervailing duties) [19 U.S.C. §§ 1671–1677(g) (Supp. V 1981), as added by the Trade Agreements Act]."[4] Countervailing duties are imposed according to 19 U.S.C. § 1671(a), which provides in pertinent part:

> (a) General Rule.—If—
> (1) the administering authority determines that—[the challenged country]
>
> * * * * * * *
>
> is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind

[3] Section 1671(c) of the 1979 Act indicates that, in the case of merchandise which is the product of a country other than a country under the Agreement, section 1303 controls.

[4] We agree with ITA and CIT that none of the exceptions concerning certain § 1303 investigation procedures added by the Trade Agreements Act is applicable in this proceeding.

> of merchandise imported into the United States, * * * then there shall be imposed upon such merchandise a countervailing duty * * * equal to the amount of the net subsidy.

It has been held that "the non-excessive remission of an indirect tax is not a bounty or grant [5] within the meaning of the statute." *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 448 (1978) (footnote omitted).

Pursuant to its countervailing duty regulations (promulgated on January 20, 1980, 45 Fed. Reg. 4932 *et seq.*), the ITA used the following three-prong test to determine whether the export payments under the CCS program are subsidies or are non-excessive rebates of indirect taxes paid but not otherwise rebated:

> (1) Whether the CCS program operates for the purpose of rebating indirect taxes, (2) whether there is a clear link between eligibility for CCS payments and payment of indirect taxes, and (3) whether the government has reasonably calculated and documented the actual indirect tax incidence borne by exported fasteners and has demonstrated a clear link between such tax incidence and the amount of CCS payments.

In concluding that the payments were subsidies, the ITA found the third prong of the test not to have been met, stating that "[o]ur determination in this case turns * * * on specific analysis of the relationship between the CCS payments and the incidence of indirect taxes borne by fastener exports. The link between indirect tax incidence and the CCS payments has not been satisfactorily demonstrated." ITA noted specifically that (1) a review of the data on actual indirect taxes paid by the producers which provided information to the Indian Government shows all but one paying total indirect taxes less than 17.5% of the value of the merchandise, (2) even these tax calculations included some payments that the ITA would not consider indirect taxes, and (3) the Indian Government had not provided evidence to demonstrate the precise determination of the tax incidence of any given product sector. In its final determination ITA concluded that "the Government of India provides bounties or grants (subsidies) within the meaning of section 303 of the Act * * *" through three programs, and directed customs officers to assess countervailing duty on imports covered by that determination. As we have noted, Industrial now appeals only the finding by ITA (and affirmance by the CIT) that India provided subsidies—rather than non-excessive indirect tax rebates—to exporters through the CCS lump-sum payment of 17.5% of the f.o.b. value of the exported merchandise.

On the appeal to the Court of International Trade, that court determined ITA's decision to have been supported on the record by substantial evidence and otherwise to be in accord with the law.

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[5] Under 19 U.S.C. § 1677(5), "[t]he term 'subsidy' has the same meaning as the term 'bounty or grant' as that term is used in section 1303 of this title."

See 19 U.S.C. § 1516a(b)(1)(B). First, the court found ITA's three-prong test to be a reasonable interpretation of the requirements of the countervailing duty statutes. Second, the court upheld ITA's process of review of the data that went into the determination of the 17.5% figure. Third, the CIT found substantial evidence to support ITA's decision, concluding that "any determination by the ITA as to the extent the CCS payments represented a rebate of indirect taxes paid would be mere speculation" because

> (1) * * * the evidence clearly establishes that there may be criteria other than indirect taxes paid which are compensable by the CCS rate, and
> (2) * * * the evidence fails to establish what portion of the 17.5% CCS payment has been allocated to compensate for indirect taxes paid as opposed to that portion allocated to compensate for other criteria, and
> (3) * * * the evidence fails to establish the actual incidence of indirect taxes on which to base the CCS payments.

Thereafter the CIT denied Industrial's motion for rehearing and vacation of judgment, in which Industrial claimed that the record demonstrates a review and reevaluation of the CCS rate by the Indian Government contemporaneous with the ITA investigation. The court noted that, regardless of any such further evaluation, the record "clearly and undisputedly reveals" that export handicaps other than indirect taxes were compensated by the CCS rate and that the record fails to provide evidence of the amounts allocated to other export handicaps relative to those allocated to indirect taxes paid.

II

The ITA's three-pronged test, set forth in Part I *supra,* is a "sufficiently reasonable" interpretation by the administering agency of the requirements of the countervailing duty statutes and regulations as to withstand judicial challenge. *See Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450–51 (and cases cited). The statute's general reference to the foreign country's "providing, directly or indirectly, a subsidy" with reference to imported merchandise (*see* 19 U.S.C. § 1671(a), *supra*) can appropriately be filled out, as ITA has done in its regulations and in the test applied here. Guideline 2 in Annex 1 to the regulations (promulgated in January 1980) provided (45 Fed. Reg. 4949):

> Export payments as an estimate of indirect taxes paid: Generally the payment to an exporter of a lump sum calculated and identified as a non-excessive rebate of the indirect tax incidence on the exported product, and its components, will not be treated as a subsidy *if the government has reasonably calculated and documented the actual tax experience of the product under investigation. (Italic added.)*

The legislative history of the Trade Agreements Act firmly supports this guideline and demonstrates that Congress wanted such export payments to be free of subsidy treatment only "if those payments are reasonably calculated, are specifically provided as non-excessive rebates of indirect taxes * * * , and are directly related to the merchandise exported." S. Rep. No. 249, 96th Cong., 1st Sess. 85, *reprinted in* 1979 U.S. Code Cong. & Ad. News 471. ITA could properly infer that for non-subsidy treatment in this instance Congress called for a showing that (a) the Indian program had the initial purpose of rebating indirect taxes, (b) there was a clear link between payment of the indirect taxes and eligibility for CCS payments, and (c) the CCS payments were determined on the basis of the actual tax incidence borne by exported fasteners. In other words, Congress wanted more than merely a *post hoc* determination that export payments can now be shown to be equal in amount to indirect taxes paid but not refunded, regardless of how the amount of payments was in fact established. Rather, the intent was that the foreign government show that the calculation of the amount of export payments was reasonable when made, through proof demonstrating the actual basis of those payments in the indirect tax incidence carried by the exported articles.[6]

Industrial strongly objects to this interpretation's focus on the foreign government's past actions with respect to challenged exports. Contending that ITA is restricted solely to deciding the question for the future on the basis of India's calculations and studies during the ITA investigation, appellant stresses the statute's use of the present or future tense (*e.g.*, "*is* providing"; "there *shall* be imposed" in § 1671(a), (1), *supra*). But this use of tense is merely a general and accepted method of drafting for all purposes, and cannot in itself override the scheme of the statute and the legislative history which show that a so-called "historical linkage" was specifically intended by Congress.[7]

In this connection, Industrial also argues that this "historical linkage" requirement renders null what it calls "the conciliation provision of the statute," 19 U.S.C. 1671c(b).[8] But this "conciliation" authorization, saying no more than that the administrative agency *may* suspend an investigation in the event of an agreement—which

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[6] Applellant argues that even under this standard it met ITA's requirements because ITA found that the CCS payments were not an *expost facto* rationalization of a pre-existing subsidy. Appellant misses the point. Just because the CCS program itself is not an *expost facto* rationalization—*i.e.*, it did not have the initial purpose of providing subsidies—does not mean that the payments actually provided have been demonstrated not to be subsidies in effect or in fact.

[7] Appellant's reliance on alleged prior Treasury Department practice is unavailing in view of Congress' clear purpose not to continue any prior Treasury practice contrary to the 1979 Act's requirements. *See* Part IV, *infra*.

[8] This part of the statute provides:

Agreements to eliminate or offset completely a subsidy or to cease export of subsidized merchandise. The administering authority *may* suspend an investigation if the government of the country in which the subsidy practice is alleged to occur agrees, or exporters who account for substantially all of the imports of the merchandise which is the subject of the investigation agree—

(1) To eliminate the subsidy completely or to offset completely the amount of the net subsidy, with respect to that merchandise exported directly or indirectly to the United States, within 6 months after the date on which the investigation is suspended, or

(2) To cease exports of that merchandise to the United States within 6 months after the date on which the investigation is suspended. [Italic added.]

would most likely be sought by the foreign government, the exporters, or the United States importers—is in no way rendered ineffective by the concomitant requirement that an ongoing investigation should include a determination of how the amount of the challenged export payments was actually calculated.

III

In the light of this understanding of the legal requirements, our review of the record accords with that of the Court of International Trade. We agree that "any determination by the ITA as to the extent of CCS payments represented a rebate of indirect taxes paid would be mere speculation" because of the inadequate information provided by the Indian Government to ITA in the course of the EPCs describing the "broad criterial * * * likely to be accepted" and in its later post-investigative accountant's report, that there may be criteria other than indirect taxes paid which are compensable by the CCS 17.5% rate. Appellant counters that India had also explained in its response that this was inconsequential because the actual figure for indirect taxes paid but not refunded was higher than the 17.5% figure. It may be true that only a portion of indirect taxes actually paid is covered by the 17.5% figure but, as noted by the CIT, the information provided by the Indian Government is not satisfactory to determine whether the 17.5% figure is an appropriate one with regard to indirect taxes. Not only was the figure originally set at 12.5% and raised to 17.5% because of more stringent packing requirements for export to North America and not because of indirect taxes paid, but the data base from which the figures were derived came from only six out of approximately 300 manufacturers, only one of which paid more than 17.5% in indirect taxes.[9]

Appellant would have us believe that the existence of the accounting report, which was sent as a replacement to the annex to India's initial response to ITA's questionnaire, demonstrates that the Indian Government has reevaluated the 17.5% CCS rate for industrial fastener exports and, baed on that accounting report, reaffirmed the correctness of the 17.5% figure. Industrial then asserts that ITA neither verified the information in this report nor considered it in reaching its final determination. Of course, a foreign government could reevaluate an export payment program and in so doing provide adequate proof for the past export payments, but there is nothing in the record to indicate that this accounting report was in any way a part of such an effort by the Indian Government to review the CCS program. This was not a true review of the kind that ITA might have to accept. Indeed, the accounting

[9]The ITA also noted that "these tax calculations included several payments * * * that we would not consider indirect taxes which may be rebated on export," such as payments to an import pool fund, a development surcharge, an engineering goods export assistance fund, a port trust fund, port congestion charges, and taxes on electricity and fuel.

report, dated March 11, 1980, would seem to be nothing but an inadequate justificatory gesture in response to the then ongoing countervailing duty determination, which had begun on February 26, 1980. As noted above (Part II, *supra*), we believe that the ITA is entitled under the Trade Agreements Act to an accounting of both how the 17.5% figure was actually established and how it can be supported. Where, as here, the evidence provided by India is insufficient to support the choice of the particular rate as reasonable, the ITA could appropriately impose a countervailing duty in the full amount of the export payment.[10]

Appellant makes much of its contention that the legal tests (discussed in Parts II and III, *supra*) were novel and unknown to India (or the other participants in this proceeding) until ITA completed its investigation. This is claimed to be a denial of due process. The answer is that it should have been known, before this investigation was begun (late in February 1980), from the ITA regulations and the Trade Act's legislative history, that information as to India's actual efforts to calculate the CCS payments would be required—and India simply did not fulfill that requirement of which it should have been aware.

The annex to the regulations (issued in January 1980) expressly provided that a payment "will not be treated as a subsidy if the government has reasonably *calculated and documented the actual tax experience of the product under investigation.*" (Italic added.) *See* Part II, *supra.* In addition, the Senate Committee report on the 1979 Act had declared that, to be other than a subsidy, the alleged non-excessive tax rebate had to be "reasonably calculated," "specifically provided as non-excessive rebates of indirect taxes," and "directly related to the merchandise exported." *Ibid.*[11] Without more, those specific directives should clearly have alerted appellant (as well as India) to the need for adequate proof of the foreign government's actual calculation of the payments as a non-excessive rebate of taxes with respect to the imported goods. Whether or not such a showing had previously been required by the Treasury Department (in passing on countervailing duty questions) is immaterial. In this aspect Congress did not wish to follow the prior Treasury practice (if it was in fact as appellant asserts it to have been). *See, e.g.,* 125 Cong. Rec. 20166–69 (1979).

In short, appellant (and India) could not properly feel that they did not know, in advance of ITA's investigation, what was required of them to show that the CCS payments were not subsidies. The very wording of India's initial response to ITA's requests, which stated that India "has reasonably calculated and documented the

[10] Because India possessed (or could gather) the necessary facts, the burden was its (not ITA's) to furnish that information. In the absence of such information making at least a prima facie case as to India's proper establishment of the CCS payments, ITA did not have to verify the information supplied by India.

[11] This was explicitly confirmed on the floor of the Senate in the course of a statement by Senator Heinz, fully accepted in this respect by Senators Ribicoff and Roth (the managers of the bill). 125 Cong. Rec. 20167, 20169 (1979).

actual tax experience," (*see* Part I, *supra*), shows that it understood that requirement. As we have held in Part III, *supra*, ITA could allowably determine that this requirement was not satisfied either by India's original response or by the accountant's report submitted later.

For these reasons, the judgment of the Court of International Trade is affirmed.

Affirmed

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